Filed 4/26/13 P. v. Guinea CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALEXY GUINEA, Defendant and Appellant.	B231518 (Los Angeles County Super. Ct. No. PA065143) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on March 27, 2013, be modified as follows:

The paragraph commencing at the bottom of page 8 with "Defendant additionally contends" and ending on page 9 with footnote five is deleted and the following is inserted in its place:

> Defendant additionally contends the two convictions cannot serve as predicate offenses because they occurred after the commission of the instant offense. We disagree.
>
> Nothing in section 186.22, subdivision (b), requires that the so-called "predicate" offenses actually predate the charged offense. Subdivision (e) defines a "'pattern of criminal street gang activity'" as "the commission of . . . two or

more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense; and the offenses were committed on separate occasions, or by two or more persons." The only temporal requirement is that the first and last of these offenses have been committed no more than three years apart.

In *People v. Loeun, supra*, 17 Cal.4th 1, the court discussed the requirement that the offenses have been "committed on separate occasions, or by two or more persons." It noted that "[t]he Legislature's use of the disjunctive 'or' in the language just quoted indicates an intent to designate alternative ways of satisfying the statutory requirements. [Citations.] . . . Therefore, when the prosecution chooses to establish the requisite 'pattern' by evidence of 'two or more' predicate offenses committed on a single occasion by 'two or more persons,' it can, as here, rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member." (*Id*. at pp. 9-10.)

In other words, there is no requirement that the offenses have been committed prior to the charged offenses. The court in *Loeun* rejected the defendant's claim that there have been "at least one *prior* offense committed on a separate occasion" so that "a defendant could . . . 'know' that commission of the current offense would provide the second of the 'two or more' predicate offenses necessary to establish a 'pattern of criminal gang activity.'" (*People v. Loeun, supra*, 17 Cal.4th at p. 10.) It also rejected his claim that the "constitutional principles of freedom of association and due process" required "that the prosecution must prove one predicate offense predating the crime charged." (*Id*. at p. 11.)

Additionally, the court addressed subdivision (f)'s definition of a "criminal street gang," as a group "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." "The Legislature's use of the

present tense 'engage in' indicates its intent that instances of current criminal conduct can satisfy the statutory requirement for a 'pattern of criminal gang activity.' '[The legislative] use of a verb tense is significant in construing statutes.' [Citations.] Therefore, the prosecution can establish the requisite 'pattern' exclusively through evidence of crimes committed contemporaneously with the charged incident." (*People v. Loeun, supra,* 17 Cal.4th at pp. 10-11.)

Since there was no requirement that the predicate offenses have predated the instant offense, Officer Bocanegra's testimony was sufficient to establish the two predicate offenses necessary to prove a pattern of criminal gang activity.

Defendant's petition for rehearing is denied. There is no change in the judgment.

_____	_____	_____
PERLUSS, P. J.	WOODS, J.	JACKSON, J.

Filed 3/27/13 P. v. Guinea CA2/7 (unmodified version)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALEXY GUINEA, Defendant and Appellant.	B231518 (Los Angeles County Super. Ct. No. PA065143)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed with directions.

Tamara Zivot, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Kim Aarons, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Alexy Guinea appeals from a judgment of conviction entered after a jury found him guilty of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))[1] and found true the allegations he personally inflicted great bodily injury on the victim (*id*., § 12022.7, subd. (a)), and the crime was committed for the benefit of a criminal street gang (*id*., § 186.22, subd. (b)(1)(C)). The trial court found true the allegations defendant suffered a prior serious felony conviction (*id*., §§ 667, subds. (a), (b)-(i), 1170.12), for which he served a prior prison term (*id*., § 667.5, subd. (b)). The court imposed a second strike sentence of eight years, plus an additional 10 years for the gang and serious felony enhancements, for a total of 18 years in state prison.

On appeal, defendant raises numerous challenges to the gang finding and enhancement. He also claims other trial and sentencing errors. We agree that the trial court imposed an incorrect sentence for the gang enhancement and the matter must be remanded for resentencing on that enhancement. In all other respects we affirm the judgment.

FACTS

A. *The Attack*

On July 28, 2009, Quincy Lucus (Lucus) and William Stenhouse (Stenhouse), young Black men, went to Lowe's in Pacoima. As they walked through the parking lot to the store, they noticed a group of about seven Hispanic men in the parking lot, looking at them in a menacing way. When they were in the store, two Hispanic men, defendant and

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[1] Now Penal Code section 245, subdivision (a)(4).

another man, approached them. The other man began sizing them up and making comments such as "what's up," "what you looking at" and "you out of bounds."

A fight ensued. Although the witnesses' memories had dimmed since the incident and preliminary hearing, resulting in discrepancies in their testimony between the hearing and trial, Lucus and Stenhouse testified that defendant threw a punch at Lucus. Then he and defendant started fighting. There were some punches thrown, but mostly they were wrestling with one another. Stenhouse and the other man were pushing one another. After about a minute, defendant and the other man ran outside.

At some point, someone said that the police were coming. Lucus and Stenhouse headed for the door. As they got there, they heard someone say something about a gun. They saw a group of five or six Hispanic men approaching them. Stenhouse saw one of the men lift his shirt to reveal a shiny object that appeared to be a gun. Lucus and Stenhouse ran back into the store. Part of the group surrounded Lucus, while two of the men chased Stenhouse who ran in another direction.

Defendant and Nathan Lawrence (Lawrence)[2] were two of the men who surrounded Lucus. Lawrence rushed toward Lucus and punched him in the face. Lucus stumbled backwards. He lunged forward, trying to get to Lawrence, when another man hit him on the side of his head, causing him to fall to the ground. He hit his knee, dislocating his kneecap. The group, including defendant, began hitting and kicking Lucus on his side and back and a couple of times in his face. Due to the injury to his knee, Lucus was unable to get up.

Stenhouse grabbed a pole and ran to help Lucus, who he saw on the ground being hit and kicked. Although at the preliminary hearing he testified that he saw defendant hitting Lucus, at trial he did not remember that but testified that he saw defendant going through Lucus' pockets. Stenhouse tried to hit Lucus' attackers with the pole, and they ran toward the exit.

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[2] Lawrence was a codefendant below but is not a party to this appeal.

As the men ran, one of them asked Stenhouse whether he was from Inglewood, and Stenhouse said no. Stenhouse asked another where they were from, and the man said "quote, crazy, something crazy, something I had never heard of." As the men left the store, one said to Stenhouse, "[O]ne of you mayates broke my homeboy's jaw."[3]

Lucus discovered that his wallet and cell phone were missing. After the police arrived, they had Stenhouse call Lucus' phone. When a man answered, Stenhouse asked if it was Lucus' phone. The man said that they beat up Lucus and took his phone, and if he wanted the phone he could come get it. The man on the phone "said should we go meet these guys, Sharkey?"

Lucus was taken to the hospital, where he had emergency surgery on his knee. He was unable to walk for six months. After physical therapy, he was able to walk with a cane but could not run or sit for long periods of time. In addition, his jaw was sore for more than a month after the attack.

Both Lucus and Stenhouse were former gang members. Lucus had been a member of the Crips until 1996 or 1997, and Stenhouse had been a member of the Piru gang, part of the Bloods gang. Lucus testified that he had never previously encountered defendant or Lawrence, and he did not know why the two attacked him.

Julia Manzano (Manzano), the Lowe's loss prevention manager, saw defendant and the other men chasing after Lucus and Stenhouse over the store's video surveillance system. She went to where the men were attacking Lucus and saw about three of the men, including defendant, hitting and kicking Lucus.[4] The attackers were yelling obscenities and, "Where are you from?" Manzano called 911.

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[3] "'Mayate' appears to be a Spanish derogatory term for a Black person." (*Lee v. Aspin* (1993) EEOC Doc. 01930617, 1993 WL 1506169, p. 1, fn. 2; Urban Dictionary <http://www.urbandictionary.com/define.php?term=mayate> (as of March 20, 2013).)

[4] Manzano remembered seeing Lawrence but not whether he was taking part in the attack. She had identified him as one of the attackers from a photographic lineup, and at the preliminary hearing she testified that she saw him going through Lucus' pockets.

Lowe's employee Jonathan Madrigal saw the group of Hispanic men running out of the store after the attack. He identified defendant as one of the group.

B. *Expert Testimony*

Los Angeles Police Officer Oscar Bocanegra worked for the gang unit for the west valley area. He testified that the West Valley Crazies started as a "tagging crew." By 2009, it had developed into a criminal street gang with about 45 members documented by law enforcement records. The gang was affiliated with the Mexican Mafia prison gang, which increased its status among local gangs.

Officer Bocanegra noted that the Lowe's in Pacoima was not in West Valley Crazies territory. However, he was aware of at least one other incident in which West Valley Crazies had gone after Black men.

Officer Bocanegra testified that the primary activities of the West Valley Crazies were attempted murders, robberies, narcotics sales, automobile theft and assault related offenses. He documented two cases in which members of the West Valley Crazies were convicted of possession of a loaded firearm and possession of a firearm by a felon. Gang members use firearms in the commission of crimes and carry the weapons to increase their reputation within the gang. Possession of firearms benefits the gang because the firearms are used in gang crimes, as well as for protection against rival gangs. The officer also noted that the significance of a gang member asking where someone was from was that it was a direct challenge to that person.

Officer Bocanegra opined that defendant was a member of the West Valley Crazies based on his prior contact with defendant, defendant's tattoos indicating gang membership, and information from other police officers and police records. Defendant had been stopped by the police and identified himself as a Crazies gang member. He had "West Valley Crazies" tattooed on his right forearm and "187"—the Penal Code section for murder—tattooed on his right hand. Defendant's gang moniker was "Shark" or "Sharkey." The officer believed that defendant, one of the older members of the West

Valley Crazies, was a shot-caller, someone who gave orders to younger gang members. Officer Bocanegra also identified Lawrence as a member of the West Valley Crazies.

The officer explained that if one gang member is disrespected or challenged or gets into a physical fight, his fellow gang members have the obligation to assist him. Given a hypothetical situation in which a gang member went into a store and started picking on someone, did not like the way the altercation went and went back outside to his fellow gang members and told them what happened, it would be expected that his fellow gang members would join in the fight. To refuse would be to lose respect of one's fellow gang members and risk violent repercussions.

Officer Bocanegra opined that the instant crime "does benefit the West Valley Crazies gang due to the fact that it wasn't just done by one single individual; it was a collective group, . . . conducted in a very public place amongst two individuals. There was a beat-down or an assault that was conducted, property was taken." The assailants identified their gang. "By that happening, these individuals who were assaulted, people talk. They are going to tell his friends what happened. They are going to tell them that they got jumped by some gang members from the Crazies, and that's going to rouse an atmosphere of fear because people are going to speak about it amongst themselves, and it's going to spread . . . ."

DISCUSSION

A. *Sufficiency of the Evidence to Support the Criminal Street Gang Enhancement*

In assessing the sufficiency of the evidence to support a criminal street gang enhancement, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings,

reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

1. Pattern of Criminal Gang Activity

Under Penal Code section 186.22 (section 186.22), subdivision (b)(1), a criminal street gang enhancement applies to a "person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." A "criminal street gang" is an organization which has as one of its primary activities the commission of specified criminal acts, and whose members have engaged in a pattern of criminal gang activity. (*Id*., subd. (f).) The commission of two or more of the predicate criminal acts by gang members constitutes a pattern of criminal gang activity. (*Id*., subd. (e); *People v. Loeun* (1997) 17 Cal.4th 1, 9.)

Defendant first contends the evidence is insufficient to prove a pattern of gang activity, in that Officer Bocanegra had no personal knowledge of the two incidents about which he testified, and his testimony failed to establish the two incidents were part of a pattern of criminal gang activity rather than isolated incidents. We disagree.

Defendant first cites cases dealing with proof of conspiracy or criminal enterprise. These cases are inapplicable, as section 186.22 sets forth the elements to be proved in order to establish the existence of a criminal street gang and a pattern of criminal gang activity. It specifies that a "'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, . . . and the offenses were committed on separate occasions, or by two or more persons." The specified offenses include prohibited possession of a firearm and carrying a loaded weapon. (*Id*., subd. (e)(31) & (33).) Officer Bocanegra testified that two members of the West Valley Crazies were convicted of these offenses. This evidence was sufficient to support a

finding of a pattern of criminal gang activity under subdivision (e) of section 186.22. (*People v. Loeun, supra,* 17 Cal.4th at p. 9.)

In re Nathaniel C. (1991) 228 Cal.App.3d 990, on which defendant relies, does not hold to the contrary. *Nathaniel C.* did not hold that proof of two predicate offenses alone was insufficient to prove a pattern of criminal gang activity. It simply involved insufficient proof of one of the two predicate offenses. (*Id*. at p. 1003.)

Defendant also challenges Officer Bocanegra's testimony as to the two predicate offenses as incompetent hearsay. Defendant failed to object to the testimony on this ground below, forfeiting his challenge on appeal. (Evid. Code, § 353; *People v. Seaton* (2001) 26 Cal.4th 598, 642-643; *People v. Pinholster* (1992) 1 Cal.4th 865, 935, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

In any event, a gang expert "may give opinion testimony that is based upon hearsay . . . . [Citations.] Such opinions may also be based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies. [Citations.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) The expert may rely on inadmissible hearsay so long as it is of a type reasonably relied upon by experts. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.)

This case is distinguishable from *Nathaniel C.*, in that here the officer relied on conviction records. In *Nathaniel C.*, the officer "offered only nonspecific hearsay of a *suspected* shooting" by a gang member, based on what he learned from another law enforcement agency regarding what "they *believed* about the shooting." (*In re Nathaniel C., supra*, 228 Cal.App.3d at p. 1003, italics added.) This case does not involve "[s]uch vague, secondhand testimony." (*Ibid*.)

Defendant additionally contends the two convictions cannot serve as predicate offenses because they occurred after the commission of the instant offense. However, Officer Bocanegra testified as to convictions occurring after the date of the instant offense. He did not testify as to the dates of the predicate offenses, but the conviction records were introduced into evidence. Inasmuch as one conviction occurred just a

month after the instant offense, it is reasonably inferable that the predicate offense did predate the instant offense. "[T]he statutory requirement is met . . . if there has been at least one *prior* offense committed on a separate occasion." (*People v. Loeun*, *supra*, 17 Cal.4th at p. 10.)[5]

2. Primary Activities

Defendant asserts that Officer Bocanegra's testimony as to the primary activities of the West Valley Crazies, without any details as to the specifics of these activities or how the officer knew about them, was insufficient to support a finding that the West Valley Crazies were a criminal street gang. Again, we disagree.

Officer Bocanegra testified that he had numerous contacts with members of the West Valley Crazies and was familiar with the gang. He also had spoken to other police officers who were familiar with the gang. He testified as to the gang's territory, the number of members, its history, identifying symbols, and association with a prison gang. When asked what the gang's primary activities are, he testified without objection: "The primary activity's going to be criminal, okay. They range from attempt murder, robberies, attempt robberies, narcotics sales, [grand theft auto]."

Defendant relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605 in support of his claim that Officer Bocanegra's testimony was insufficient to establish that the West Valley Crazies has as one of its primary activities the commission of specified criminal acts. (§ 186.22, subd. (f).) In *Alexander L.*, the gang expert, when asked about the gang's primary activities, testified, "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic

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5 We note that *People v. Loeun*, *supra*, 17 Cal.4th at page 10 suggests that it is unnecessary that any of the predicate offenses predate the charged offense. In any event, here at least one, and possibly both, of the offenses about which Officer Bocanegra testified occurred prior to the charged offense.

violations.'" (*In re Alexander L., supra*, at p. 611.) The court noted that "[n]o specifics were elicited as to the circumstances of these crimes, or where, when or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities." (*Id.* at pp. 611-612.)

On appeal the court held that even if it was reasonably inferable from the expert's testimony that the specified crimes constituted the gang's primary activities, the testimony lacked an adequate foundation. (*In re Alexander L., supra*, 149 Cal.App.4th at p. 612.) The court noted that "information establishing reliability was never elicited from [the gang expert] at trial," so there was no way to determine whether it was from reliable sources or incompetent hearsay, as was the case in *In re Nathaniel C., supra*, 228 Cal.App.3d 990. (*Alexander L., supra*, at p. 612.) Therefore, the expert's "conclusory testimony cannot be considered substantial evidence as to the nature of the gang's primary activities." (*Ibid.*, fn. omitted.)

Here, unlike *Alexander L.*, Officer Bocanegra testified as to the basis of his knowledge of the West Valley Crazies, and he testified directly as to the gang's primary activities. Defendant did not object that his testimony lacked foundation, forfeiting that objection on appeal. (*People v. Seaton, supra*, 26 Cal.4th at pp. 642-643.) The officer's testimony therefore provided substantial evidence of the gang's primary activities.[6]

Defendant further claims that there is insufficient evidence that he knew the West Valley Crazies' primary activities included the commission of the specified offenses, and the Constitution requires both "'guilty knowledge and intent' with respect to an organization that forms the basis for imposing criminal punishment upon the individual" member. Section 186.22 contains no such knowledge requirement. (Cf. *People v. Loeun, supra*, 17 Cal.4th at p. 10 [defendant's knowledge of predicate crimes not required to prove pattern of criminal gang activity].) However, the section "satisfies the

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6 For this reason, we need not address defendant's claim that the predicate offenses could not be used to establish the gang's primary activities, in that Officer Bocanegra did not specifically testify that they were "gang-related."

requirements of due process by 'impos[ing] increased criminal penalties only when the criminal conduct is felonious and committed not only "for the benefit of, at the direction of, or in association with" a group that meets the specific statutory conditions of a "criminal street gang," but also with the "specific intent to promote, further, or assist in any criminal conduct by gang members." [Citation.]' [Citation.]" (*Id*. at p. 11.) Nothing more is required. (*Ibid*.)

Defendant's reliance on our opinion in *People v. Carr* (2010) 190 Cal.App.4th 475 for the proposition "that the Constitution requires an awareness element to be read into section 186.22[, subdivision](b)" is sorely misplaced. Contrary to defendant's argument, in *Carr* we held that "the People need not separately prove a defendant's subjective knowledge of the criminal activities of his or her fellow gang members to establish the [Penal Code] section 190.2, subdivision (a)(22), special circumstance." (*Carr*, *supra*, at p. 487, fn. omitted.) Penal Code section 190.2, subdivision (a)(22), parallels section 186.22, subdivision (b), applying to an intentional killing "while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang." The knowledge requirement is contained in subdivision (a) of section 186.22, which criminalizes "active[] participat[ion] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity." While "there is a constitutional requirement that, before a defendant can be penalized for being an active participant in a criminal organization . . . the defendant must be shown to have had knowledge of the gang's criminal purposes" (*Carr*, *supra*, at p. 487), no such knowledge requirement exists where, as in subdivision (b) of section 186.22, the defendant is punished not for his participation in the gang but for his commission of gang-related crimes (*People v. Loeun*, *supra*, 17 Cal.4th at pp. 10-11).

3. For the Benefit of, and with the Specific Intent to Assist Criminal Conduct by Gang Members

Defendant first asserts that there is insufficient evidence that he knew the other participants in the crime were gang members, a prerequisite to finding he had "the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1)). He points to the lack of direct evidence that this was a gang crime: "No one here was yelling out gang slogans, or wearing colors or flashing signs. None of the other witnesses [besides Officer Bocanegra] testified to any awareness or evidence at the time of the incident that these were gang members or this was a gang-related altercation. The prosecution provided no evidence [defendant] made any admissions this fight was gang-related and no evidence of a revenge or retaliation motive against a rival gang. Lowe's was not in gang territory."

Defendant relies on *People v. Albillar*, *supra*, 51 Cal.4th 47, which states that "if substantial evidence establishes that the defendant intended to and did commit the charged felony with *known* members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Id*. at p. 68, italics added.) We conclude that substantial circumstantial evidence supports the jury's finding that defendant acted with the intent to promote, further or assist criminal conduct by gang members.

The evidence here reasonably shows that when Lucus and Stenhouse, young Black men, went to Lowe's in Pacoima, a group of about seven Hispanic men in the parking lot was looking at them in a menacing way. When they were in the store, two of the men, defendant and another man, approached them and challenged them with such comments as "what's up," "what you looking at" and "you out of bounds." A brief fight ensued, then defendant and the other man left the store. They returned, however, with other members of the group and proceeded to attack Lucus and chase after Stenhouse. During the attack, Manzano heard the attackers yelling, "Where are you from?"

After the attack, one of the Hispanic men asked Stenhouse whether he was from Inglewood, and Stenhouse said no. Stenhouse asked another where they were from, and

the man said "quote, crazy, something crazy." Then one man said to Stenhouse, "[O]ne of you mayates broke my homeboy's jaw." Afterwards, when Stenhouse called Lucus' phone, he spoke to a man who said that they beat up Lucus and took his phone, and if he wanted the phone he could come get it. The man on the phone "said should we go meet these guys, Sharkey?"

Officer Bocanegra identified defendant as a member of the West Valley Crazies and testified that defendant's gang moniker was "Shark" or "Sharkey." The officer acknowledged that the Lowe's in Pacoima was not in West Valley Crazies territory, but he knew of at least one other incident in which West Valley Crazies had gone after Black men. He noted that the significance of a gang member asking where someone was from was a direct challenge to that person. He also testified as to how the attack would benefit the West Valley Crazies by creating fear of the gang.

It is reasonably inferable from the foregoing that members of the West Valley Crazies attacked Lucus and Stenhouse because they were Black. Members of the group challenged them by asking where they were from and whether they were from Inglewood. At least one member of the group identified them as the Crazies, and one identified the purpose of the attack as revenge for breaking his "homeboy's jaw."

Officer Bocanegra was able to identify Lawrence as another member of the West Valley Crazies. Since the gang had only about 45 members, it is reasonably inferable that defendant knew Lawrence was a gang member. Additionally, after the attack, the person who answered the phone taken in the attack referred to the person with him as "Sharkey," which is defendant's gang moniker. This evidence supports a finding defendant knew he was assisting criminal conduct by other gang members.

Defendant also asserts there is insufficient evidence that the attack was committed for the benefit of a criminal street gang. He argues that there was no evidence "that the West Valley Crazies encouraged such crimes or relied on them to frighten or intimidate anyone, that it was somehow a 'signature' crime," or "that the gang to which [defendant] allegedly belonged committed these crimes in a manner distinctive from the commission by non-gang members, or that only gang members commit the crimes charged."

None of the foregoing is required to prove that the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang" (§ 186.22, subd. (b)(1)). "We . . . find substantial evidence that defendant[and other members of the group] came together *as gang members* to attack [Lucus and Stenhouse] and, thus, that [he] committed [the] crime[] in association with the gang. [Citations.]" (*People v. Albillar, supra,* 51 Cal.4th at p. 62.)

In *People v. Morales* (2003) 112 Cal.App.4th 1176, the question was whether "evidence that one gang member committed a crime in association with other gang members" was sufficient to satisfy this element. (*Id*. at p. 1198.) The court responded that "[a]rguably, such evidence alone would be insufficient, even when supported by expert opinion, to show that a crime was committed for the *benefit* of a gang. The crucial element, however, requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang." (*Id*. at p. 1198.)

Here, as discussed above, there is evidence defendant committed the crime with other gang members. "Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the . . . crime[] in association with fellow gang members." (*People v. Morales, supra,* 112 Cal.App.4th at p. 1198.)

B. *Due Process*

Defendant contends the true finding on the gang enhancement violates due process, in that there is insufficient evidence to support the finding. He relies on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103 and *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1079, which held that section 186.22 requires a showing that the murder was intended to facilitate criminal conduct by gang members, that is other criminal conduct beyond the charged crime. This holding was rejected by the California Supreme Court in *People v. Albillar, supra*, 51 Cal.4th 47. The Supreme Court concluded "the scienter

requirement in section 186.22[, subdivision](b)(1)—i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members'—is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Albillar, supra,* at p. 66.) We are bound by this pronouncement. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

C. *Confrontation Clause*

Defendant contends that Officer Bocanegra's testimony based on hearsay information contained in field identification cards violated the Confrontation Clause. He also contends that his Evidence Code section 352 objection to the admission of gang evidence was sufficient to preserve the issue for appeal. We reject both contentions.

Defendant's reliance on *People v. Partida* (2005) 37 Cal.4th 428 for the proposition that an Evidence Code section 352 objection to the admission of gang evidence preserves constitutional challenges to the admission of the evidence is misplaced. *Partida* held that "[a] defendant may not argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial. A defendant may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process." (*Partida, supra,* at p. 431.) Since defendant did not object to Officer Bocanegra's testimony on hearsay grounds, he has forfeited his claim that admission of the hearsay violated the Confrontation Clause. (*Ibid*.; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 809, 812-813 [Confrontation Clause claim might not be forfeited if objection below made on a hearsay basis].)

In any event, Officer Bocanegra's testimony did not violate the Confrontation Clause. In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court held that the Confrontation Clause applies where testimonial hearsay is involved; where nontestimonial hearsay is at issue, state hearsay laws apply. (*Id*. at p. 68; *People v. Cooper* (2007) 148 Cal.App.4th 731, 740-741.) As explained in *People v. Sisneros* (2009) 174 Cal.App.4th 142, "'Hearsay in support of

expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned.' [Citations.] 'The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. [Citations.]" (*Id*. at p. 153.)

As previously stated, a gang expert "may give opinion testimony that is based upon hearsay . . . . [Citations.] Such opinions may also be based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies. [Citations.]" (*People v. Vy, supra*, 122 Cal.App.4th at p. 1223, fn. 9.) The expert may rely on inadmissible hearsay so long as it is of a type reasonably relied upon by experts. (*People v. Gardeley, supra*, 14 Cal.4th at pp. 618-619.) Officer Bocanegra's testimony fell within these guidelines. There was no Confrontation Clause violation. (*Crawford v. Washington, supra*, 541 U.S. at p. 68; *People v. Sisneros*, *supra*, 174 Cal.App.4th at p. 153.)

D. *Motion to Dismiss*

Defendant further contends that the trial court erred in denying his motion to dismiss pursuant to Penal Code section 1118.1. His contention rests on the assumption that the gang findings are not supported by the evidence. Inasmuch as we have concluded the findings are supported by substantial evidence, the contention fails.

E. *Gang Expert Testimony Usurping the Jury's Function*

Defendant contends the gang experts' testimony usurped the jury's function, thereby depriving him of his constitutional rights to trial by jury, a fair trial and due process of law. He complains that through the use of improper hypothetical questions, the experts were permitted to give opinions as to defendant's guilt. We disagree.

The California Supreme Court addressed the permissible scope of gang expert testimony in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*). The court addressed "the

propriety of permitting the gang expert to respond to the hypothetical questions the prosecution asked regarding whether the" crime was gang related. (*Id*. at p. 1044.) The appellate court had held that the trial court erred in allowing the gang expert "'to testify in response to a hypothetical question that the [crime], thinly disguised in the hypothetical[,] . . . was for the benefit of [the gang] and was gang motivated.'" (*Ibid*.)

The Supreme Court held that "[t]he Court of Appeal erred in condemning the hypothetical questions because they tracked the evidence in a manner that was only 'thinly disguised.'" (*Vang*, *supra*, 52 Cal.4th at p. 1045.) Experts are permitted to give opinions on the basis of hypothetical questions which ask the experts to assume the truth of their facts. (*Ibid*.) However, the "[u]se of hypothetical questions is subject to an important requirement. 'Such a hypothetical question must be rooted in facts shown by the evidence . . . .' [Citations.]" (*Id*. at pp. 1045-1046.) It "'"may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." [Citation.]'" (*Id*. at p. 1046.) "The reason for this rule should be apparent. A hypothetical question not based on the evidence is irrelevant and of no help to the jury." (*Ibid*.)

As applied to the case before it, the court explained, "this rule means that the prosecutor's hypothetical questions had to be based on what the evidence showed these defendants did," in order to "help[] the jury determine whether these defendants . . . committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Vang*, *supra*, 52 Cal.4th at p. 1046, italics omitted.)

The court rejected the claim that such expert opinion is "'objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citations.]" (*Vang*, *supra*, 52 Cal.4th at p. 1048.) While an expert may not express an opinion on *the defendant's* guilt, which is "the ultimate issue of fact for the jury," the expert may express an opinion on that ultimate issue based on hypothetical questions rooted in the facts of the case. (*Ibid*.) That the expert's "opinion, if found credible, might, together

with the rest of the evidence, cause the jury to find the [crime] was gang related," "'makes the testimony probative, not inadmissible.' [Citation.]" (*Id*. at pp. 1048-1049.)

The court also rejected the claim "that permitting these hypothetical questions invades the province of the jury. However, as noted, expert testimony is permitted even if it embraces the ultimate issue to be decided. [Citation.] The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang, supra*, 52 Cal.4th at pp. 1049-1050.)

Here, the prosecutor started out by asking Officer Bocanegra hypothetical questions concerning whether other gang members would be expected to join in a fight started by one gang member: "So what if, hypothetically, I'm a gang member, I go into a store and I start picking on someone and get in a little scuffle with them, and I don't like the way it went; so I leave the store. . . ." The questioning then got more specific: "In your experience with Hispanic gangs and particularly with West Valley Crazies, what would . . . probably happen to someone who just said under that circumstance, just said nah, I just don't feel like getting in a fight today. . . ."

The questioning then lost the guise of a hypothetical:

"Q [The prosecutor] Do you have any opinion as to whether—Have you reviewed the facts in this case?

"A Yes, I have.

"Q And have you read—reviewed the police reports in this case, as well?

"A I have.

"Q Do you have any opinion as to whether or not the robbery and the assault committed on Quincy Lucus by the members of the West Valley Crazies—

"[Defendant's counsel] Your honor, I'm going to object at this point.

"[Lawrence's counsel] I join.

"The court: Overruled.

"By [the prosecutor]:

"Q Do you have any opinion as to whether or not this robbery and assault was committed for the benefit of the West Valley Crazies criminal street gang?

"A Yes.

"Q And what is your opinion?

"A My opinion is that the crime was committed does benefit the West Valley Crazies gang due to the fact that it wasn't just done by one individual; it was a collective group, okay, conducted in a very public place amongst two individuals." Officer Bocanegra continued to explain the basis of his opinion, touching on the later phone call as well.

Clearly, the question was improperly phrased and should have been phrased in the form of a hypothetical. We reject defendant's claim that this deprived him of his constitutional rights to trial by jury, a fair trial and due process of law. As *Vang* points out, "expert testimony is permitted even if it embraces the ultimate issue to be decided." (*Vang*, *supra*, 52 Cal.4th at p. 1049.) The caveat is that the expert may not express an opinion on the defendant's guilt, which is "'the ultimate issue of fact for the jury.'" (*Id.* at p. 1048.) "The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] 'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.)

The erroneous admission of the evidence does not require reversal of the judgment unless it is reasonably probable defendant would have obtained a more favorable result had there been no error. (*People v. Earp* (1999) 20 Cal.4th 826, 878.) The opinion itself was admissible. It is not reasonably probable the jury would have found the gang enhancement allegations untrue had the opinion been obtained through a "'thinly disguised'" (*Vang*, *supra*, 52 Cal.4th at p. 1044) hypothetical. Therefore, reversal is not required.

F. *Instruction with CALCRIM No. 370*

Defendant contends the trial court erred in instructing the jury on motive pursuant to CALCRIM No. 370 without informing the jury that it did not apply to the gang enhancement, because motive is an element of the enhancement. We disagree.

CALCRIM No. 370 provides: "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

CALCRIM No. 370 specifically refers to the "crimes charged." The jury was instructed that defendant was "charged in Count 4 with assault with force likely to produce great bodily injury in violation of Penal Code section 245" (CALCRIM No. 875), and "charged in Count 2 with Robbery in violation of Penal Code section 211" (CALCRIM No. 1600).

The instruction on the criminal street gang enhancement, CALCRIM No. 1401, begins: "If you find the defendant guilty of the *crimes charged* in Counts 3 or 4, you must the decide whether, for each crime, the People have proved the additional allegation that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang. . . ."

When reviewing the effect of challenged instructions, we look at the instructions given as a whole. (*People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. Garrison* (1989) 47 Cal.3d 746, 780.) We determine whether a reasonable jury would have interpreted the instruction in the manner proposed by defendant. (*Cain, supra*, at p. 36; *People v. Warren* (1988) 45 Cal.3d 471, 487.)

The jury instructions here make it clear that CALCRIM No. 370 applies to crimes charged, they specify the crimes charged, and they direct the jury to consider the criminal street gang allegation only after determining defendant's guilt or innocence of the crimes charged. No reasonable jury would interpret CALCRIM No. 370 to negate the intent requirements of the gang enhancement.

Moreover, as noted in *People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1139, "[a]n intent to further criminal gang activity is no more a 'motive' in legal terms than is any other specific intent." Hence, "[t]here was no error." (*Id.* at p. 1140.)[7]

G. *Instruction and Argument on Uncharged Conspiracy*

The prosecutor requested that the jury be instructed pursuant to CALCRIM No. 416 on evidence of an uncharged conspiracy. Defendant's counsel objected to this instruction. She explained that the instruction as drafted "says to commit robbery and or assault, which is very unspecific. [¶] . . . [M]y understanding of conspiracy has to be a conspiracy to commit a certain act. And here it looks as if the person who drafted this instruction was not sure which act it was they were going to commit.

"I agree with [the prosecutor] about the evidence that we have seen as the court does, I just do not believe that it showed . . . that there was evidence of a conspiracy. The fact that some people ran out, some people ran in does not show there was a conspiracy to commit robbery. I mean, I understand later on Mr. Lucus didn't have his cell phone. That doesn't show ahead of time there was any kind of agreement to take Mr. Lucus' cell phone."

The prosecutor agreed to delete the references to a robbery, and the instruction as given referred only to the assault. The court also gave CALCRIM No. 417 on liability for coconspirators' acts.

The prosecutor argued to the jury: "There are three different ways in which you can be guilty of a crime in this case, these are called theories of liability. First is that the defendant is a direct perpetrator. The second is that the defendant is an aider and abettor. And, third, the defendant is a co-conspirator. They are, basically, different avenues to guilt in this case." The prosecutor went on to discuss the three theories of liability.

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[7] Inasmuch as there was no error, we need not address the People's claim that defendant's challenge to CALCRIM No. 370 was forfeited by his failure to object to the instruction.

Defendant now contends there was insufficient evidence of a conspiracy adduced at trial to justify instruction on that theory of liability. He further claims that his contention is not forfeited by his failure to make this objection below (*People v. Hinton* (2006) 37 Cal.4th 839, 896-897), in that his substantial rights were affected by the instruction (Pen. Code, § 1259; *People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) We find no error.

"It is firmly established that evidence of conspiracy may be admitted even if the defendant is not charged with the crime of conspiracy. [Citations.] Once there is proof of the existence of the conspiracy there is no error in instructing the jury on the law of conspiracy. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134.) Proof of the existence of a conspiracy in this context requires only "'prima facie evidence of the conspiracy. [Citation.] The prima facie showing may be circumstantial [citation], and may be by means of any competent evidence which tends to show that a conspiracy existed. [Citation.]' [Citation.]" (*Ibid.*)

The "[e]vidence is sufficient to prove a conspiracy to commit a crime 'if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]' [Citation.]" (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1135.)

Defendant suggests that it is impossible that a conspiracy could have been formed "in those split seconds where unidentified persons charged across the parking lot into the store." He cites no authority to support the proposition that formation of a conspiracy requires any set amount of time and may not occur with great rapidity.

Formation of a conspiracy does not require any great length of time: "There is no need to show that the parties met and expressly agreed to commit a crime in order to prove a conspiracy. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] . . . As one court has noted, the maxim that '"One's actions speak louder than words" is

peculiarly applicable to proof in conspiracy cases.' [Citation.]" (*In re Nathaniel C.*, *supra*, 228 Cal.App.3d at p. 999.)

The evidence here is clearly sufficient to make a prima facie showing of conspiracy. After defendant and one man had an altercation with Lucus and Stenhouse, they went outside to where their companions waited. Then the group of them returned to the store, attacked Lucus and went after Stenhouse. Members of the group belonged to the same gang. It is reasonably inferable that the members of the group came to a positive or tacit understanding that they were going to attack Lucus and Stenhouse. Thus, there was no error in instructing the jury pursuant to CALCRIM No. 417 or arguing uncharged conspiracy as a theory of liability. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1134-1135.)

H. *Sentencing on Gang Enhancement*

Defendant contends, and the People agree, that the trial court imposed an incorrect sentence on the gang enhancement and the case must be remanded for resentencing on the enhancement. We agree as well.

Section 186.22, subdivision (b)(1)(A), provides that: "Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion." Subparagraphs (B) and (C) apply to serious felonies (Pen. Code, § 1192.7, subd. (c)) and violent felonies (*id*., § 667.5, subd. (c)), and they authorize imposition of five- and 10-year enhancements, respectively. Here, the trial court imposed a five year enhancement under subparagraph (B).

An assault in which great bodily injury is inflicted, as defendant was convicted of here, is both a violent and a serious felony. (Pen. Code, §§ 667.5, subd. (c)(8), 1192.7, subd. (c)(8).) However, the trial court granted defendant's motion to strike the great bodily injury allegation. In the absence of the great bodily injury finding, defendant's assault conviction was no longer a serious felony, and a five-year enhancement was unauthorized. Therefore, the five-year enhancement must be stricken and the case

remanded to allow the trial court to exercise its discretion to impose a two, three or four year enhancement under subparagraph (A) of section 186.22, subdivision (b)(1).

Additionally, because the assault is no longer a serious felony, the five-year enhancement imposed pursuant to Penal Code section 667, subdivision (a), must be stricken. Subdivision (a) applies to "any person convicted of a serious felony who previously has been convicted of a serious felony."

I. *Cumulative Error*

Defendant contends cumulative error deprived him of due process and a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 847; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Inasmuch as we have rejected the majority of defendant's claims of error, we reject his contention. (*People v. Kipp* (1998) 18 Cal.4th 349, 383.)

J. *Presentence Custody Credit*

The trial court awarded defendant 876 days of presentence custody credit, consisting of 584 days of actual credit and 292 days of conduct credit. The court awarded him two days of conduct credits for each four days served. Defendant contends he should have been awarded two days of conduct credit for each two days served under Penal Code section 4019 (section 4019) as amended effective October 1, 2011.

Defendant committed his offense on July 28, 2009. At that time, section 4019 provided that if all conduct credits were earned, "a term of six days will be deemed to have been served for every four days spent in actual custody" (*id*., subd. (f)), i.e., two days of conduct credit for each four days served.

Section 4019 was amended effective January 25, 2010 to provide that if all conduct credits were earned, "a term of four days will be deemed to have been served for every two days spent in actual custody" (*id*., subd. (f)), i.e., two days of conduct credit for each two days served. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.)

Section 4019 was amended again, effective September 28, 2010, to restore the previous provisions, i.e., credit for six days served for each four in custody, or two days'

credit for each four days of actual custody. (Stats. 2010, ch. 426, § 2.) Defendant was sentenced on March 10, 2011, when these provisions were in effect.

Thereafter, section 4019 was amended again to restore the previous provisions giving two days of credit for each two served, or four days' credit for each two in actual custody. (Stats. 2011-2012, 1st Ex. Sess., ch.12, § 35.) These amendments to section 4019 became operative October 1, 2011. Subdivision (h) of that section specifically provides: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned prior to October 1, 2011, shall be calculated at the rate required by the prior law."

Defendant contends that equal protection demands that he be given the conduct credits afforded under this latest version of section 4019. We disagree.

Although the question of the retroactivity of this version is before the Supreme court, the Courts of Appeal have generally held that prospective application of the 2011 version of the statute does not violate equal protection. (See, e.g., *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 56, review den. Feb. 13, 2013 [Fourth District]; *People v. Garcia* (2012) 209 Cal.App.4th 530, 541, review den. Dec. 19, 2012 [Second District, Division 5]; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 399-400 [Sixth District]; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553, review den. Oct. 31, 2012 [Fifth District]; and *People v. Olague* (2012) 205 Cal.App.4th 1126, review granted Aug. 8, 2012, S203298 [Sixth District].) We agree with these holdings.

As explained in *People v. Ellis*, *supra*, 207 Cal.App.4th 1546, the Supreme Court recently addressed the question of the retroactivity of the January 25, 2010 amendment to section 4019 in *People v. Brown* (2012) 54 Cal.4th 314. "Despite the fact the Legislature included no statement of intent in that regard in the amendment [citation]," unlike the amendment at issue here, "the state high court held the amendment applied prospectively only, meaning qualified prisoners in local custody first became eligible to earn conduct credit at the increased rate beginning on the amendment's operative date. [Citation.]"

(*Ellis, supra*, at p. 1550.) The amendment was not subject to the assumption that, absent evidence to the contrary, the Legislature intends statutory amendments to statutes reducing punishment for crimes to apply to all defendants whose judgments are not yet final on the statute's operative date. (*Id*. at p. 1551.) Section 4019 does not reduce the penalty for a crime; "[r]ather than addressing punishment for past criminal conduct, section 4019 'addresses *future conduct* in a custodial setting by providing increased incentives for good behavior.' (*Brown*, *supra*, at p. 325.)" (*Ellis, supra*, at p. 1551.)

Brown also held that the prospective application of the amendment did not violate equal protection for essentially the same reason. It explained that "'. . . [t]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.' ([*People v.*] *Brown, supra*, 54 Cal.4th at pp. 328-329 . . . .)" (*People v. Ellis, supra*, 207 Cal.App.4th at p. 1551, italics omitted.) If they are not similarly situated, there is no equal protection violation. (*Brown, supra,* at p. 328; *Ellis, supra*, at p. 1551.)

Like the court in *Ellis*, "We can find no reason why *Brown*'s conclusions and holding with respect to the January 25, 2010, amendment should not apply with equal force to the October 1, 2011, amendment. [Citation.] Accordingly, we reject defendant's claim he is entitled to earn conduct credits at the enhanced rate provided by current section 4019 for the . . . period of his presentence incarceration." (*People v. Ellis, supra*, 207 Cal.App.4th at p. 1552.)

K. *Restitution Fine*

Finally, defendant claims the trial court erred in imposing a $3,600 restitution fine pursuant to Penal Code section 1202.4 (section 1202.4) without determining his ability to pay that amount. Defendant failed to raise this issue below, resulting in forfeiture of his claim on appeal. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.)

In an attempt to avoid this forfeiture, he argues that the fine was unauthorized and thus could be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) He also argues that his failure to raise the issue is excused because his claim is based on a case decided by the United States Supreme Court subsequent to his sentencing. (See *People v. Nelson*, *supra*, 51 Cal.4th at p. 227.) Neither argument has merit.

At the time of defendant's sentencing, section 1202.4, subdivision (b), provided that "[i]n every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony . . . ." It also provided that "[i]n setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (*Id.*, subd. (b)(2).)

A defendant's inability to pay the fine *may* be considered, but it does not preclude imposition of the statutorily authorized fine. Subdivision (c) of section 1202.4 provided: "The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two hundred-dollar ($200) . . . minimum. . . ."

Subdivision (d) of section 1202.4 provided that in setting the amount of the fine in excess of the $200 minimum, "the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. . . . Consideration of a

defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. . . ."

Here, defendant was convicted of one felony count and sentenced to 18 years in prison. The fine imposed was the product of 18 years and $200: $3600. Hence, it was statutorily authorized under section 1202.4, subdivision (b)(2). The trial court was permitted, but not required, to consider defendant's ability to pay in fixing a restitution fine above the $200, and it was not required to make findings on the matter. Hence, the fine imposed was in no way unauthorized by the statute.

Defendant next contends that the trial court was not permitted to impose a restitution fine above the statutory minimum without a jury finding of his ability to pay, relying on the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], that the maximum sentence a judge may impose is that permitted by the facts established by the jury verdict or admitted by the defendant. He relies on the recent United States Supreme Court decision in *S. Union Co. v. United States* (2012) ___ U.S. ___ [132 S.Ct. 2344, 183 L.Ed.2d 318], which holds that the rule of *Apprendi* applies to sentences of criminal fines. (*Id*. at pp. ___, ___ [132 S.Ct. at pp. 2348-2349, 2357].)

Under *S. Union Co.* and *Apprendi*, the court has discretion in setting a criminal fine so long as it does not "'inflic[t] punishment that the jury's verdict alone does not allow.'" (*S. Union Co. v. United States*, *supra*, ___ U.S. at p. ___ [132 S.Ct. at p. 2350; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 [124 S.Ct. 2531, 159 L.Ed.2d 403] adds that the punishment also may be based on the defendant's prior convictions.

Here, the restitution fine was within the limits of that permitted by the jury's verdict (felony conviction, gang enhancement) and defendant's prior convictions (serious felony and prison sentence enhancements), based on the term of imprisonment imposed for the conviction and enhancements. It was within the statutory discretionary limits of section 1202.4. There was no *Apprendi* violation.

We do note, however, that since the gang enhancement imposed under section 186.22, subdivision (b)(1)(A), will have to be decreased, this may affect the amount of the restitution fine.

DISPOSITION

The judgment of conviction is affirmed. The five-year enhancement imposed under Penal Code section 667, subdivision (a), is stricken. The five-year enhancement imposed under section 186.22, subdivision (b)(1)(B), is stricken, and the trial court is directed to exercise its discretion under section 186.22, subdivision (b)(1)(A), in imposing the enhancement.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.